

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF
KAMLOOPS INVESTMENT CORPORATION,

Appellant;

v.

PUGET SOUND AIR POLLUTION
CONTROL AGENCY,

Respondent.

PCHB No. 86-100

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
ORDER

This matter, the appeal of two civil penalties assessing fines totalling \$2,000 for alleged violations of asbestos removal regulations, came on for hearing before the Pollution Control Hearings Board; Wick Dufford (presiding) and Lawrence J. Faulk, Chairman, on July 23, 1986, in Lacey, Washington. Respondent elected a formal hearing.

Appellant, a Netherlands Antilles corporation, appeared through its local representative, Earl Gaberman. Respondent Agency was represented by Keith D. McGoffin, Attorney at Law. The proceedings

1 were transcribed by Gene Barker and Associates.

2 Witnesses were sworn and testified. Exhibits were examined. From
3 the testimony, exhibits and contentions of the parties, the Pollution
4 Control Hearings Board makes these

5 FINDINGS OF FACT

6 I

7 Appellant Kamloops Investment Corporation (Kamloops) owns a
8 building at 1512 Fifth Avenue in downtown Seattle. The structure was
9 built in 1904. One of the tenants is an art gallery which includes a
10 basement area devoted in part to display for viewing and in part to
11 working space and storage. Through this basement area runs an exposed
12 overhead pipe, over 120 feet in length, which at some time in the
13 remote past was covered with asbestos insulation. The common use of
14 such material in older buildings in the city is a notorious fact.

15 II

16 Respondent Puget Sound Air Pollution Control Agency (PSAPCA) is a
17 municipal corporation with responsibility for administering a program
18 of air pollution prevention control in a multi-county area which
19 includes Seattle and the site of the art gallery which is the focus of
20 this dispute.

21 PSAPCA has filed with this Board a certified copy of its
22 regulations of which the Board takes official notice.

23 III

24 Kamloops bought the building in October of 1984 and, thereafter,
25 was from time to time advised by its tenants in the art gallery that

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1 insulation material was flaking off the pipe in the basement. Without
2 investigating the nature of the insulation, the owners decided to
3 clean off the pipe and contacted a workman to remove its covering.
4 The job was undertaken over the weekend of February 15 and 16, 1986.

5 IV

6 On Monday morning, February 17, 1986, the gallery's manager on
7 arriving for work encountered a mess in the basement. Insulation
8 particles were left on the rugs, on the paintings and in the
9 employees' work area bathroom. Fearing the material might be
10 asbestos, the manager closed off the basement area and sent his
11 employees home until an investigation could be made. He contacted
12 Kamloops' representative, who, after arriving on the scene, concurred
13 in the closure. Kamloops' representative then got in touch with a
14 qualified asbestos removal contractor and with PSAPCA.

15 V

16 PSAPCA's inspector took samples from the scene on February 19,
17 1986. She observed that the affected area was closed off to prevent
18 the public from entering inadvertently. The sampling results showed
19 the insulating material to contain a significant percentage of
20 asbestos.

21 VI

22 The qualified asbestos removal contractor eventually arrived and
23 performed the cleanup job, using appropriate techniques and
24 equipment. The work was completed under the watchful eye of an
25 inspector from the Department of Labor and Industries. On follow-up

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1 inspection, PSAPCA found the affected area to be clean.

2 VII

3 Asbestos is one of only six pollutants classified federally as a
4 "hazardous air pollutant." The term describes a substance which

5 causes, or contributes to, air pollution which may
6 reasonably be anticipated to result in an increase in
7 mortality or an increase in serious irreversible, or
8 incapacitating reversible, illness.

9 Asbestos, then is very dangerous indeed. It is subject to a special
10 set of work procedures and emission limitations (under Section 112 of
11 the Federal Clean Air Act) called National Emission Standards for
12 Hazardous Air Pollutants. The threshold for regulation is any
13 material containing more than one (1) percent asbestos.

13 VIII

14 On February 19, 1986, PSAPCA mailed three notices of violation to
15 Kamloops. The first charged a failure to file a notice of intent to
16 remove asbestos prior to commencing removal, the second alleged a
17 violation of requirements for wetting the material in the process of
18 removing asbestos, and the third asserted improper methods of disposal.

19 Thereafter, on May 20, 1986, PSAPCA mailed two notices of civil
20 penalty to Kamloops, one assessing a \$1,000 fine for the first two
21 alleged offenses (NOCP No. 6441) and the other assessing a \$1,000 fine
22 for the third alleged offense (NOCP No. 6442).

23 IX

24 Kamloops filed its appeal of these penalty assessments with this
25 Board on June 19, 1986. It did not contest the violations themselves,

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1 but requested mitigation or waiving of the penalties.

2 X

3 The deterioration of the insulation created a hazardous situation
4 which the improperly conducted removal operation briefly compounded.

5 Exposure to released asbestos fibers by employees of the gallery
6 or of Kamloops was modest, but the original removal workman likely
7 experienced more substantial exposure.

8 Once the problem was recognized, the gallery and Kamloops'
9 representative were totally cooperative and readily complied with all
10 requests made by government officials. Kamloops paid \$4,000 to
11 compensate for loss of time by gallery employees.

12 XI

13 Any Conclusion of Law which is deemed a Finding of Fact is hereby
14 adopted as such.

15 From these Findings of Fact, the Board comes to these

16 CONCLUSIONS OF LAW

17 I

18 The Board has jurisdiction over the subject matter and the
19 parties. Chapter 43.21B RCW.

20 II

21 WAC 173-400-075 adopts as state regulations the National Emission
22 Standards for Hazardous Air Pollutants (NESHAPS), promulgated by the
23 United States Environmental Protection Agency prior to October 1,
24 1984. These include work practice procedures for handling asbestos.
25

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1 PSAPCA has adopted equally or more stringent asbestos handling
2 regulations in Article 10 of Regulation I.

3 III

4 Notice of Civil Penalty No. 6441 asserts two violations on or
5 about February 17, 1986: (1) a violation of Section 10.03 for failure
6 to provide PSAPCA with written advance notice of intent to remove
7 asbestos; (2) a violation of Section 10.04 for removing asbestos
8 materials without adequately wetting the materials both during and
9 after the stripping operation.

10 Notice of Civil Penalty No. 6442 asserts a violation on or about
11 February 19, 1986, of Section 10.05 for failing before disposal to
12 seal all asbestos-containing waste material in leak-tight containers
13 while wet.

14 As to the timing of these civil violations, we deem the pleadings
15 to be amended to conform to the proof. We then conclude that the
16 three regulatory sections cited were, indeed, violated during the
17 removal operation at issue.

18 IV

19 The Washington Clean Air Act and regulations adopted pursuant to
20 its terms are enforced on a strict liability basis. The absence of
21 knowledge or intention does not operate to excuse violations, Crystal
22 Mountain, Inc. v. PSAPCA, PCHB Nos. 85-256, 85-257 (April 28, 1986),
23 although such matters may operate to mitigate the amount of a penalty.

24 V

25 For each violation, a civil penalty may be assessed. RCW

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1 70.94.431. The maximum which can be assessed by PSAPCA for any
2 particular violation is \$1,000. Here two violations were, in the
3 aggregate assigned a \$1,000 penalty and a third violation alone was
4 subject of another \$1,000 penalty.

5 The prime purpose of civil penalties is not exact retribution, but
6 rather to influence behavior, both of the perpetrator and of the
7 public at large. Cosden Oil Co. v. DOE, PCHB No. 85-111 (December 3,
8 1985). With this in mind, we evaluate the amount of penalties on the
9 basis of factors bearing on reasonableness. These include: (1) the
10 nature of the violation; (2) the prior behavior of the violator and
11 (3) actions taken after the violation to solve the problem. Puget
12 Chemco v. PSAPCA, PCHB No. 84-245 (1985).

13 VI

14 Here we note that there is no record of any prior history of
15 non-compliance by Kamloops and that, as soon as the situation was
16 recognized, every effort was made to avoid harm and to solve the
17 problem.

18 However, we agree with PSAPCA that significant penalties are
19 appropriate for mishandling asbestos in view of the extraordinarily
20 high health danger involved and the resulting need for broad-scale
21 deterrence. The nature of such violations is serious, particularly
22 where, as here, there is some evidence of human exposure.

23 Moreover, in this case ignorance of the law should not serve as a
24 mitigating factor, even as to the charge of failure to notify. Owners
25 of older buildings in Seattle should reasonably be on inquiry as to

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1 the nature of old insulation within such buildings. The gallery
2 manager's immediate perception of danger on observing the debris
3 underscores this point. There is no record of any effort to discover
4 what the material was or how to handle it until it was too late. See
5 Air Tech Construction v. PSAPCA, PCHB No. 85-253 (April 22, 1986).
6 Once a problem was suspected, it was not difficult to find the proper
7 agencies or get the proper information. Prior notice and prior
8 communication would have prevented the events which occurred.

9 VII

10 Under all the facts and circumstances, we conclude that Notice of
11 Civil Penalty No. 6441 assessing \$1,000 for two distinct violations
12 should be upheld. We do not, however, agree that that is reasonable
13 to assess the maximum penalty for the single violation asserted under
14 Notice of Civil Penalty No. 6442. Accordingly, we hold that the Order
15 set forth below is appropriate.

16 VIII

17 Any Finding of Fact which is deemed a Conclusion of Law is hereby
18 adopted as such.

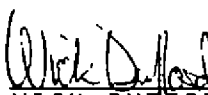
19 From these Conclusions of Law, the Board enters this
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ORDER

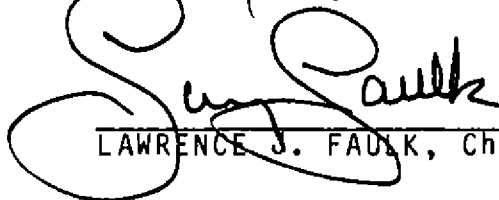
Notice of Civil Penalty No. 6442 issued by PSAPCA to Kamloops Investment Corporation, assessing a \$1,000 penalty is affirmed. Notice of Civil Penalty No. 6442 is affirmed in the amount of \$500. The remaining \$500 thereof is vacated.

DONE this 29th day of September, 1986.

POLLUTION CONTROL HEARINGS BOARD



WICK DUFFORD, Presiding Officer



LAWRENCE J. FAULK, Chairman

9/29/86